INDEX

CITATIONS

370-242—69——1

Cases—Continued

Cases—Continued

Statutes and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 395

UNITED STATES OF AMERICA, PETITIONER

v.

M. O. SECKINGER, JR., T/A M. O. SECKINGER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (App. 12) is reported at 408 F. 2d 146. The order of the district court dismissing the government's complaint (App. 9) is unreported.

JURISDICTION

The judgment of the court of appeals (App. 23) was entered on February 28, 1969. By order entered on May 27, 1969, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including July 28, 1969. The petition was filed on July 28, 1969, and was granted on October 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether negligence attributable to the United States precludes it from obtaining indemnification from a negligent government contractor under a standard form contractual indemnity provision which makes the contractor "responsible for all damages to persons or property that occur as a result of his fault or negligence."

REGULATORY PROVISIONS INVOLVED

Title 44 of the Code of Federal Regulations (1949 ed.), as amended to January 1, 1957 (1957 Cum. Supp.), provided in relevant part:

> SEC. 54.1. *Forms to be used.* Except as otherwise authorized, the following standard forms shall be used without deviation by all Executive agencies for or in connection with every formal contract of the kinds specified that may be entered into by them:
>
> * * * * *
>
> (c) *Construction contracts.* (1) U.S. Standard Form No. 23–Rev., approved by the Secretary of the Treasury, Revised April 3, 1942—for fixed-price contracts for the construction or repair of public buildings or works.
>
> * * * * *
>
> SEC. 54.13. *Construction contract.* U.S. Standard Form No. 23—Rev.
>
> * * * * *
>
> ART. 10. *Permits and responsibility for work.* The contractor shall * * * be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work * * *.

The regulations presently in force are essentially similar. See 41 C.F.R. (1969 rev.) 1–16.401, 1–16.402, 1–16.404, 1–16.901–23A Art. 12.

The standard form incorporated in the contract in question in this case is set forth in full in Appendix A, pp. 27–43, *infra*.

STATEMENT

This case arises out of a 1956 accident which injured one of respondent Seckinger's employees, one Branham, while he was working at the Paris Island Marine Depot in South Carolina under a contract between Seckinger and the government. Branham, a steamfitter, walked across the steam pipe he was installing on an overpass to assist a fellow employee; in so doing, he came against a live, uninsulated electric wire carrying 2400 volts of electricity, and was burned and thrown to the ground by the resulting shock. Branham received Workmen's Compensation payments from the South Carolina authorities (App. 7, 10), and then sued the United States in the United States District Court for the Eastern District of South Carolina under the Federal Tort Claims Act, 28 U.S.C. 2671, *et seq.*, claiming that it had been negligent in failing both to deenergize or insulate the wire near the work site and to warn the workers of the dangers involved.

The United States sought to implead Seckinger as a third party defendant at that time, alleging that Branham's injuries were caused by Seckinger's negligence and seeking indemnification for any government liability under the standard contract clause providing that the contractor (Seckinger)

> shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work [App. 4, 9].

On Seckinger's motion, however, the trial judge dismissed the third-party complaint without prejudice, finding that the controversy it presented "should not be resolved at this time and further that its inclusion in the trial of [Branham's complaint] would unnecessarily and improperly complicate the issues [raised herein]" (App. 4). Thereafter, in the summer of 1961, the district court found the government to have been negligent and awarded Branham judgment for $45,000 and costs, which the government has paid (App. 4).

In September, 1964, the United States instituted the present action against Seckinger in the United States District Court for the Southern District of Georgia. The complaint was in two counts. The first count was based upon the contractual indemnity provision quoted above, alleging facts constituting proximately causal negligence on Seckinger's part: failure to request that the lines be deenergized or insulated; failure to provide safety insulation; permitting, even directing, Branham to work near the live wires;[1] and failure to prevent him from proceeding in a dangerous manner (App. 3–5). The second count alleged the same facts, adding that "having undertaken to per-

[1] At the trial of Branham's action, he testified that his foreman, a Seckinger employee, had ordered him to make the crossing that led to his injury. (See pp. 34–38 of the transcript of that action, which has been lodged with the Clerk.)

form the contract * * * the defendant * * * [was] obligated to perform the work properly and safely and to provide workmanlike service * * *" (App. 5), which it had failed to do. Seckinger moved to dismiss the complaint, and the district court did so. In its brief opinion, it reasoned (1) that the government should have appealed the dismissal of its third-party complaint in Branham's action, and was foreclosed from initiating independent proceedings against Seckinger; and (2) that the contract clause did not permit indemnification of the government for its own negligence and—government negligence having been found in Branham's action—such indemnification was necessarily sought in this suit (App. 9–10).

On appeal, the United States Court of Appeals for the Fifth Circuit rejected the district court's first ground of decision, noting that in dismissing the third-party complaint the trial judge had specifically invited the present suit (App. 14–15). It agreed, however, with the district court's second ground of decision. The court reasoned that since the government had been found negligent in the prior action, any indemnification it might obtain would necessarily be indemnification for its own negligence. Upon concluding that the question whether such indemnification would be proper under a government contract was a matter of federal rather than state common law, the court adopted as the federal rule the "majority rule" among the states—that indemnification for an indemnitee's own negligence will be allowed only if there is an "unequivocal expression of intent" to that effect in the contract. Finding no such statement in the con-

tract here, the court concluded that the government is not entitled to any indemnification from Seckinger (App. 20–22).

ARGUMENT

INTRODUCTION AND SUMMARY

The respondent Seckinger bound himself to accept responsibility for "*all* damages that occur as a result of *his* fault or negligence" in the performance of his fixed-price government construction contract.[2] [Emphasis supplied.] One of Seckinger's employees was injured on the job and recovered damages from the government on the ground that the government had been negligent. Having been frustrated in its attempt to implead Seckinger in that action, the government instituted the separate action below; the complaint, like the rejected third-party complaint, asserted the government's right under the responsibility clause to recover over against Seckinger because the injury to the employee had been caused by Seckinger's negligence.

[2] Such a clause has been required in all fixed-price construction contracts at least since 1938. 41 C.F.R. (1938 ed.) 11.1, 11.3, 12.23 Art. 10; 41 C.F.R. (1943 Cum. Supp.) 11.4(c), 12.23 Art. 10; 41 C.F.R. (1949 ed.) 4.1(c), 4.13 Art. 10; 44 C.F.R. (1957 Cum. Supp.) 54.1(c), 54.13 Art. 10; 41 C.F.R. (1961 rev.) 1–16.401, 1–16.402, 1–16.404, 1–16.901–23A Art. 11; 41 C.F.R. (1969 rev.) 1–16.401, 1–16.402, 1–16.404, 1–16.901–23A Art. 12. See also Armed Services Procurement Regulation 7–602.13, 32 C.F.R. (1969 rev.) 7.602–13. This same clause was required by the Federal Works Agency (Bureau of Community Facilities), BCF Form 657, Art. 28; FWA Form W–254, Art. 30 (revised December 3, 1942); Form SE–103, Art. 20. The War Department also employed a similar contractual provision, W. D. Contract Form No. 2, Art. 10 (8–13–43), found in Procurement Regulation No. 13, p. 1309 (¶ 1302.10), Art. 10.

The court of appeals erred in holding that Seckinger's undertaking to bear "all damages" caused by "his fault or negligence" gave him no responsibility to the government in any situation where both were negligent. It read into federal contract law, and applied here, the sweeping maxim that indemnification for an indemnitee's own negligence will be allowed only if there is an unequivocal expression of intent to require such indemnification in the contract. But this maxim is inapplicable where the indemnitor as well as the indemnitee has been negligent. Courts might be understandably reluctant to allow a negligent indemnitee to recover from a faultless indemnitor who has not expressly undertaken such liability, but there is nothing extraordinary about an agreement as to who shall bear the risk of damage awards in situations where both contracting parties are negligent. Thus there is no reason for restrictive interpretation of this responsibility clause.

Indeed, the realities of the situation suggest that an obligation of indemnification was intended and should be enforced. The government hired Seckinger to perform construction work on its property, and Seckinger was best able to control safety conditions. Yet absent an indemnity clause, Seckinger would have been insulated from negligence liability to its employees by the state workmen's compensation law, throwing the entire risk of such liability upon the government. The government would be properly concerned to avoid that risk, and at the same time encourage its contractor carefully to supervise working conditions primarily

under his control, by requiring an indemnity agreement.

Similar considerations have led this Court and others to find such contractual obligations even where there is no responsibility clause of any kind, *e.g.*, *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124, and many courts have been less demanding of contractual language of indemnity where the indemnitor as well as the indemnitee was negligent. Certainly if an indemnity obligation may be found in the absence of any agreement on the subject, there is the more reason to allow indemnity where a contractor has agreed to be responsible for "all damages" his negligence causes; the artificial rule of construction adopted by the court below should not be used to read out of this contract what might be found in it even if it were not written there. Apparently recognizing the force of this reasoning, this Court years ago rejected the artificial rule in a case which, although it arose in a maritime context, is in no significant respect different from the case at bar. *Porello* v. *United States*, 330 U.S. 446.

In any event, the responsibility clause here is unequivocal. To read it, as the court below has done, as applying only to situations where there is no government negligence would deprive it of any sensible meaning—for the government can be found liable and consequently will need indemnification only if it is actually negligent. If the language is to be given any meaning at all, the choice cannot be between full indemnification or none, as the court below believed. Rather, that choice must be between full indemnification and

indemnification based on comparative fault—a choice this Court recognized was open in *Porello, supra.* While we believe the government is entitled to full indemnification if it proves what is alleged in the complaint, it is at least entitled to a determination of the portion of the damages that should be assumed by Seckinger.

I. WHERE BOTH PARTIES TO A CONTRACT ARE NEGLIGENT TOWARDS A THIRD PERSON, THERE IS NO OCCASION FOR AN EXTRAORDINARILY RESTRICTIVE INTERPRETATION OF A CONTRACTUAL RESPONSIBILITY CLAUSE

Since the government's complaint seeks indemnification only for damages which occurred as the result of Seckinger's negligence, there is no issue in this case of obliging Seckinger to pay for damages which were not the result of his fault; we do not contend that the contract clause in question covers such a situation. At trial, the government would have to prove both Seckinger's negligence and the proximate relation between that negligence and the damages sought to be recouped; but the allegations in this regard must be assumed in considering the propriety of the dismissal of its complaint.[3]

[3] The fact that the government has been adjudicated negligent (in a proceeding to which Seckinger was not a party) does not foreclose this proof logically or as a matter of law. It is commonplace that there may be more than one negligent actor, and more than one proximate cause of injuries sustained, in any accident involving the behavior of more than one person. See, *e.g., Porello* v. *United States*, 153 F. 2d 605, 607 (C.A. 2), remanded, 330 U.S. 446.

Unaccountably, the court of appeals intimates that the government's negligence in this case was far more substantial

A.

The maxim applied below—that indemnification for an indemnitee's own negligence will be allowed only if expressly and unequivocally provided for in the contract—rests on value judgments which are largely inapplicable to this situation. There is indeed a fairly well established policy of the law to discourage innocent persons from assuming or being burdened with the negligence liabilities of others.[4] *E.g., Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85; *Boston Metals Co.* v. *Winding Gulf*, 349 U.S. 122, 126–127 (Frankfurter, J., concurring). "Courts are understandably reluctant to allow a negligent indemnitee to invoke general language [of indemnification] * * * to recover from a faultless indemnitor." *Associated Engineers, Inc.* v. *Job*, 370 F. 2d 633, 651 (C.A. 8), certiorari denied, 389 U.S. 823. While most courts have not for-

in culpability and effect than respondent's (App. 17, 21, 22). The complaint alleges the exact opposite (App. 4–5). Whether respondent was negligent, and to what degree, and to what extent that negligence caused the injuries for which the United States was made to respond in damages, are, of course, issues which remain for determination at trial.

In this determination the government should not be bound by any factor of res judicata arising out of the Branham trial, since Seckinger was not a party to that case. The government is no more bound by that decision, with respect to Seckinger, than Seckinger is, with respect to the government.

[4] Modern insurance practices have made even this policy a questionable one. The price to the innocent party of comprehensive insurance then appears to be simply one of the costs of the contract. *Jacksonville Terminal Co.* v. *Railway Express Agency, Inc.*, 296 F. 2d 256, 262–263 (C.A. 5), certiorari denied, 369 U.S. 860; *Indemnity Insurance Co. of North America* v. *Koontz-Wagner Electric Co.*, 233 F. 2d 380, 383 (C.A. 7).

bidden such arrangements as a matter of public policy, compare *Bisso, supra,* there is nonetheless the notion that it would be "extraordinary" to impose on an innocent party liability for the negligence of another, and that therefore the "purpose to impose this * * * liability on the Indemnitor must be spelled out in unmistakeable terms." *Batson-Cook Co.* v. *Industrial Steel Erectors,* 257 F. 2d 410, 413 (C.A. 5).

There is, on the other hand, nothing extraordinary about the parties to a contract agreeing between themselves who shall bear the risk of a damage award if both of them are negligent. Where a property owner hires a contractor to perform work for him, it is altogether natural that the contractor should assume full responsibility for the proper conduct of the work even though the property owner might also be liable on more or less technical grounds. And such an allocation of responsibility is especially appropriate as to injuries to the contractor's own employees when, as here, the contractor's liability is limited by a state workmen's compensation scheme and otherwise it is only the property owner who has the risk of full tort liability.

No policy of the law suggests that no matter how negligent a contractor may have been, or to what extent its negligence may have contributed to injuries complained of, the government should be denied any indemnification so long as it too was negligent in some degree. Even in the absence of contractual provisions, an actor guilty of some degree of negligence has been permitted to obtain indemnification from another determined to have been principally at fault. *United Air*

Lines, Inc. v. *Wiener*, 335 F.2d 379, 398–402 (C.A. 9) (reviewing the authorities). Similarly, this Court has held many times that a negligent shipowner may recover indemnity from a negligent stevedoring contractor, even in the absence of an express provision of indemnity in the stevedoring contract. *E.g., Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124; *Weyerhaeuser S.S. Co.* v. *Nacirema Oper. Co.*, 355 U.S. 563; *Crumady* v. *The J. H. Fisser*, 358 U.S. 423. As this Court stated in *Ryan, supra*, at 133–134:

> Competency and safety * * * are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's * * * contract. It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. * * *[5]

A fortiori, there is no sound policy that requires a court to read restrictively a contractor's express

[5] See also *General Electric Co.* v. *Moretz*, 270 F. 2d 780 (C.A. 4), certiorari denied, 361 U.S. 964, where the court relied on *Ryan* to find an indemnity obligation in the contract between a trucking line and a shipper (the truck driver recovered from the shipper on the ground that it had negligently loaded the truck, causing the load to shift). Similar cases are: *San Francisco Unified School Dist.* v. *California Bldg. Maintenance Co.*, 162 Cal. App. 2d 434, 328 P. 2d 785; *Blackford* v. *Sioux City Dressed Pork, Inc.*, 254 Iowa 845, 849–50, 118 N.W. 2d 559; *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E. 2d 567; *Moroni* v. *Intrusion-Prepakt, Inc.*, 24 Ill. App. 2d 534, 540, 165 N.E. 2d 346, 349–50; *Phoenix Bridge Co.* v. *Creem*, 102 App. Div. 354, 92 N.Y.S. 855, affirmed, 185 N.Y. 580, 78 N.E. 1110; *Mayhew* v. *Iowa-Illinois Telephone Co.*, 279 F. Supp. 401, 405–406 (S.D. Iowa).

ndertaking to be responsible for "all damages" aused by his negligence. Thus, courts have frequently een less demanding of contractual language of in-lemnity when the indemnitor also was negligent, even hough the common phrasing of the indemnity maxim loes not distinguish such situations from those where he indemnitor is blameless. Where both parties have een negligent, courts frequently enforce contractual lauses placing the full burden of damage on one arty. See, *e.g.*, *Associated Engineers* v. *Job, supra;* Spurr v. *LaSalle Const. Co.*, 385 F. 2d 322, 330 (C.A.); *Unitec Corp.* v. *Beatty Safway Scaffold Co. of Oregon*, 358 F. 2d 470 (C.A. 9); *Anthony* v. *Louisiana & Ark. R. Co.*, 316 F. 2d 858, 864–866 (C.A. 8); *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 02, 911–912 (C.A. 9); *National Transit Co.* v. *Davis*, F. 2d 729 (C.A. 3); *Union Pac. R. Co.* v. *Ross Transfer Co.*, 64 Wash. 2d 486, 488, 392 P. 2d 450, 51; *Newberg Const. Co.* v. *Fischbach*, 46 Ill. App. d 238, 196 N.E. 2d 513.

In the government contract context, it is the con-ractor and not the government which is primarily oncerned with the condition of the worksite, and specially the safety of the contractor's own em-loyees. That is certainly part of the meaning of he contract clause disputed in this case, for it requires he contractor to assume responsibility for "all dam-ge" he causes by "his negligence or fault." Other auses in the standard contract which Seckinger gned require the contractor to have a competent perintendent present "on the work at all times uring progress" (Appendix A, *infra*, p. 36, cl. 10)

and to comply with all pertinent provisions of the Corps of Engineers Safety Manual (32 C.F.R. (1968 ed.) 7.602–42(a)). That Manual requires, *inter alia*, periodic meetings with employees to brief them on safety matters. Moreover, it is the contractor, not the government, which is in direct control of the manner and conditions of work and thus is best situated to prescribe safe industrial practices.[6]

Fairness dictates that the contractor should bear the primary burden of compensation if his employee is injured. Contractors are, however, generally insulated from direct negligence liability to their employees because of state workmen's compensation laws. Only if there is a responsible third party, such as the government was in this case, will the employee have any chance to assert tort liability; then, any concurrent negligence on the third party's part will enable him to recover his entire damages from it, often in substantial amounts.[7] But the third party's liability may

[6] The primacy of the contractor's obligation is also shown by recently passed federal legislation authorizing the Secretary of Labor to promulgate health and safety standards for all federal or federally assisted construction projects, imposing on the employer responsibility for compliance with those standards, and providing sanctions including contract cancellation and ineligibility for further contracts. P.L. 91–54, 91st Cong., 1st Sess., enacted August 9, 1969.

[7] Under the workmen's compensation laws in all states, the worker surrenders all rights and remedies which he would otherwise have against his employer as a result of the injury. *E.g.*, S.C. Code, § 72–121 (1962); Larson, *Workmen's Compensation Law*, Vol. 2, § 65 (p. 135), § 72 (p. 170). At the same time, all of the American compensation systems recognize that the worker may have a common law tort action against a third person whose negligence or wrongful conduct, as here, has been a proximate cause of his injuries. See Larson, *supra*, Vol. 2, § 71

be based only upon a failure to provide the employee a safe place to work or to warn him of a dangerous condition—failures which the contractor could and should have remedied.[8] Compare *Associated Engineers, Inc.* v. *Job, supra.* In such a situation it is un-

(p. 165). There is, however, considerable variation as to who is a "third person".

> In some states the third persons may include everyone except the immediate employer; in others the exclusiveness of the compensation benefits immunizes fellow employees, officers, agents and representatives of the employer; in many a general contractor is immune from liability to the employees of his subcontractor; and in a few one engaged in a common enterprise with the employer out of which the injury arises may be free from tort liability.

A. McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 Texas L. Rev. 389, 394 (1959).

[8] Claims made in negligence actions against the government by its contractors' employees are frequently of this character For example, in *Fisher* v. *United States*, 299 F. Supp. 1 (E.D. Pa.), appeal pending, C.A. 3, Nos. 18,151–18,153, the government was held liable for its "negligent" failure to warn an employee of a subcontractor of the danger of walking on spreader boards used by the contractors at the site, because government inspectors were said to know that inexperienced employees were present on the site who would use the boards in imitation of other workmen, but without being warned by them of the dangers involved. In *Yerkes* v. *United States*, No. 68–1198 in the same court, the plaintiff employee was injured when the ladder his employer furnished toppled and he put his hand into a wall fan. In *Terry* v. *United States*, No. 68–C–129, E.D.Ark., the government is being sued for injuries suffered when employer-installed scaffolding collapsed. Countless similar examples of attempts to escape the recovery restrictions imposed by workmen's compensation schemes could be given. Of course, the government can sometimes establish that it was not negligent, and the courts of appeals have refused to find government negligence simply in a failure by the government to exercise contractual rights of safety inspection and enforcement. *United States* v. *Page*, 350 F.2d

fair that the party hiring the contractor should bear the entire burden of tort liability simply because it is the only available defendant; even if there were any such intent in a state's workmen's compensation law, that law could not determine rights between the United States and its contractor. The indemnity obligation not only redresses the unfairness, but also gives the contractor a necessary and desirable incentive to assure safe work methods and conditions for his employees.

In this connection, it may be noted that insurance against such contractual liability is available to the contractor either under a Comprehensive General Policy or other liability policy, or may be obtained in a separate policy. See *Fire, Casualty and Surety Bulletins*, Casualty & Surety Section, Public Liability, pp. B–1 to B–3 (Contractual Liability) [National Underwriters Co., Cincinnati, Ohio, 1966]. Such insurance is recommended by the contractors' trade association,[9] as well as by The American Institute of Architects, whose general form construction contract is in wide use throughout the nation. A contractor must normally insure against liability under workmen's compensation, disability benefit and other similar employee benefit acts, and against personal injury and property damage

28 (C.A. 10), certiorari denied, 382 U.S. 979; *Roberson* v. *United States*, 382 F.2d 714 (C.A. 9); *Wright* v. *United States*, 404 F.2d 244 (C.A. 7). But it is often possible, as it was here, to make out a plausible case of government as well as contractor negligence, and in those circumstances some action over against a negligent contractor is required to protect the government against full liability for the losses involved.

[9] See *Insurance and Bond Checklist* (p. 3) of the Associated General Contractors of America, Inc., Washington, D.C.

claims by persons other than its employees. Therefore, it seems appropriate that a contractor should also insure itself against contractual liability, especially in view of the fact that explicit indemnity arrangements are now standard in the most widely used forms of construction contracts.[10]

B.

This Court has previously refused to apply the artificial rule of construction followed below, in the inter-

[10] For example, the standard form contract of The American Institute of Architects (AIA Document A201, Sept. 1967) contains the following very broad indemnification clause:

4.18 INDEMNIFICATION

4.18.1 The Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (b) is *caused in whole or in part by any negligent act or* omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, *regardless of whether or not it is caused in part by a party indemnified hereunder.* [Emphasis added.]

4.18.2 In any and all claims against the Owner or the Architect or any of their agents or employees by any employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph 4.18 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any Subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts.

pretation of a maritime contract indistinguishable for present purposes from the contract in this case. In *Porello* v. *United States*, 153 F.2d 605 (C.A. 2), remanded, 330 U.S. 446, applied on remand, 94 F. Supp. 952 (S.D.N.Y.), a stevedoring company had contracted to perform services for a government vessel, and undertook to be responsible "for any and all damage or injury to persons and cargo * * * through the negligence or fault of the Stevedore, his employees and servants." 330 U.S. at 457. One of the company's employees was injured through the concurrent negligence of the company and the government. He sued the government, which in turn claimed and obtained in the court of appeals full indemnification under the quoted provision.

On petition for rehearing and in this Court, the stevedoring company argued for the "majority rule"—the rule applied below in the present case—and claimed that the quoted language did not constitute an unequivocal expression of intent. 153 F.2d at 609; Brief for Petitioner, No. 69, O.T., 1946, 36–41. The court of appeals rejected that argument on the ground that, as "the United States could be liable only if itself at fault * * * [that] construction * * * would make the indemnity provision meaningless." 153 F.2d at 609. This Court passed over the argument and adopted instead the alternative suggestion of petitioner's brief, that the case be remanded for a determination what the intention of the quoted language actually was. Brief for Petitioner, *supra*, at 41–42; 330 U.S. at 457. Obviously that remand is inconsistent with the proposition that the government's indemnifi-

cation rights depended upon an *unequivocal* expression of intent to provide indemnity for government negligence; the Court necessarily determined that they did not.[11]

The relevance of the *Porello* holding to the present case is not blunted by the fact that that contract arose in a maritime context. There are no special maritime considerations—and none are suggested in the *Porello* opinion or briefs—to justify one rule for interpreting maritime contracts of indemnity and another applicable to federal contract cases generally. Indeed, the parties and this Court all agreed that the indemnity feature of the *Porello* contract had no special maritime nature. Brief for Petitioner, pp. 48–52; Brief for the United States, pp. 45–50; 330 U.S. at 456. Admiralty jurisdiction was founded on the maritime nature of the underlying tort, *ibid.*, but the contractual issues and underlying policies are the same. Here, as there, if the language binding the contractor to assume responsibility for "all damages" caused by "his fault or negligence" reflects an intent to indemnify in circumstances where both contracting parties have been negligent, no artificial rule of contract construction should be invoked to defeat that intent.

Moreover, as we have noted previously, this Court has allowed indemnity in situations similar to the

[11] When, on remand, the stevedoring company refused to come forward with any evidence concerning the intent of the clause, the district court ruled that the court of appeals' interpretation therefore remained in effect. The Second Circuit has subsequently reaffirmed its *Porello* holding that a clause so worded requires full indemnification. *A/S J. Ludwig Mowinckels Rederi* v. *Commercial Stevedoring Co.*, 256 F.2d 227, 231.

present one even in the absence of contractual responsibility clauses. *E.g., Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, p. 12, *supra*. In essence, the contractual indemnity provision in Seckinger's contract with the United States is a direct statement of the warranty of workmanlike performance this court found in *Ryan*. The contractor's responsibility should be greater, not less, where he has expressly acknowledged it; no artificial rule of construction should be allowed to give the contractual language the precise opposite of its natural meaning, thereby exposing the government to the possibility of extensive liability for injuries that may be primarily the fault of government contractors.

II. THE RIGHT OF THE UNITED STATES TO INDEMNITY FOR THE CONSEQUENCES OF THE CONTRACTOR'S NEGLIGENCE IS ESTABLISHED BY THE EXPRESS AND UNEQUIVOCAL LANGUAGE OF THIS CONTRACT

We perceive no equivocation in the standard contractor responsibility clause included in the contract between Seckinger and the United States. It plainly provides that the contractor shall be responsible "for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work * * *." No exception is made for cases in which government negligence also contributes to the damage, and, as we have shown, there are substantial reasons not to read such an exception into the clause.

If the responsibility clause were so narrowly read as not to apply where negligence by the government

also contributes to an accident, the result would be to deprive the clause of any substantial meaning. For the government can seek indemnity under this clause only where it has been subjected to tort liability to a third party, and the government is not subject to tort liability without fault on its part. *Dalehite* v. *United States*, 346 U.S. 15, 44–45; 28 U.S.C. 2671, *et seq.* Despite the contrary suggestion below (App. 21–22), even a settlement or compromise of a claim by the government can be authorized only for injury "caused by the negligent or wrongful act or omission of" a federal employee, 28 U.S.C. 2672; a case could not lawfully be settled to postpone resolution of the question of negligence to an action between the government and its indemnitor, if the responsible government officials believed the government's acts had not wrongfully contributed to the injury complained of.[12] Thus the contractual provision could come into play only in situations where the United States had been adjudicated negligent or had in effect conceded its negligence through compromise or settle-

[12] If there was not strong evidence that the government's negligent acts had contributed to the injury, the indemnitor would be in a position—provided he had not previously assented to the settlement offer—to contest indemnity on the ground that the settlement was not reasonable. *Aetna Freight Lines, Inc.* v. *R. C. Tway Co.*, 352 S.W. 2d 372, 374 (Ky., 1961); *New York Central & H. R.R. Co.* v. *T. Stuart & Son Co.*, 260 Mass. 242, 157 N.E. 540, 543–44 (1927); *Dunn* v. *Ucalde Asphalt Paving Co.*, 175 N.Y. 214, 218, 67 N.E. 439, 440 (1903); *Globe Indemnity Co.* v. *Schmitt*, 142 Ohio St. 595, 53 N.E. 2d 790, 794 (1944); *Tugboat Indian Co.* v. *A/S Ivarans Rederi*, 334 Pa. 15, 5 A. 2d 153, 156 (1939). In practice, if the government believes it has an indemnity claim, it refers any settlement offer to the putative indemnitor.

ment. But the court of appeals ruled that a negligent contractor is not required to indemnify the government where the government is also negligent. Thus, the court's reading of the clause denies it all practical meaning.[13]

There is no policy against indemnification between two negligent parties that would justify invalidation of a contractual indemnity clause or a strained construction that would deprive it of any substantial practical effect. See *Porello* v. *United States*, 153 F. 2d 605, 609 (C.A. 2), remanded, 330 U.S. 446; *National Transit Co.* v. *Davis*, 6 F. 2d 729, 730–733 (C.A. 3); *Eastern Gas and Fuel Associates* v. *Midwest-Raleigh, Inc.*, 374 F. 2d 451, 454 (C.A. 4).

> It is by now well established that indemnification will be ordered in cases where the indemnitee as well as the indemnitor has been negligent, even in the absence of an explicit contractual agreement to that effect, when to hold otherwise would render the contract of indemnity meaningless. [*Unitec Corp.* v. *Beatty Safway Scaffold Co. of Oregon*, 358 F. 2d 470, 479 (C.A. 9), citing cases.] [14]

---

[13] There is thus no occasion here to apply the maxim that the contract should be construed against the government as its drafter. "A prerequisite to the application of [the] rule is that the alternative interpretation placed upon the alleged ambiguity by the contractor be, under all the circumstances, a reasonable and practical one." *Gelco Builders & Burjay Const. Corp.* v. *United States*, 369 F. 2d 992, 999–1000 (Ct. Cl.); *Dittmore-Freimuth Corp.* v. *United States*, 390 F. 2d 664, 682, 182 Ct. Cl. 507; *Jefferson Constr. Co.* v. *United States*, 151 Ct. Cl. 75, 84.

[14] An analogous problem is presented in the interpretation of the words "all risks" in exculpatory clauses. The English

III. THE GOVERNMENT IS ENTITLED TO FULL INDEMNITY IF IT PROVES ITS ALLEGATIONS; AT THE MINIMUM IT IS ENTITLED TO INDEMNITY ON A COMPARATIVE BASIS TO THE EXTENT THE CONTRACTOR'S NEGLIGENCE CONTRIBUTED TO THE INJURY

As this Court recognized in *Porello*, 330 U.S. at 458, there are not two but three possible meanings to the contract responsibility clause as applied to the situation in which both parties are negligent. There may be (1) a right to full indemnification, (2) no right to any indemnification, or (3) a right to indemnification on a comparative basis, to the extent the contractor's negligence contributed to a damage award. Since the

---

courts have held that an "all risks" clause can have different meanings depending on whether the person relying on the clause is liable as an insurer or only for negligence. In *Rutter* v. *Palmer*, [1922] 2 K.B. 87, 90, the Court of Appeal stated:

> A common carrier is liable for the acts of his servants whether they are negligent or not; an ordinary bailee is not liable for the acts of his servants unless they are negligent. If a common carrier would protect himself from responsibility for all acts of his servants he must use words which will include those acts which are negligent; because words which would suffice to protect him from liability for acts properly done by his servants in the course of their service may fall short of protecting him from their negligent acts. But if an ordinary bailee uses words applicable to the acts of his servants, inasmuch as he is not liable for their acts unless negligent, the words will generally cover negligent acts, although such acts are not specially mentioned, because otherwise the words would have no effect. * * *

Accord: *Halbauer* v. *Brighton Corp.*, [1954] 2 All E.R. 707 (C.A.); *Alderslade* v. *Hendon Laundry, Ltd.*, [1945] 1 K.B. 189.

government cannot be held liable in the absence of fault, however, the second choice (barring recovery completely) would render the clause meaningless, and is unacceptable for the reasons we have given. Therefore, we believe that the choice lies only between full and partial indemnification in this case.

In the government's view, the proper choice would be for full indemnification if it proves the allegations of its complaint, that Seckinger's negligence caused the damages suffered. The common law typically has regarded the problem of allocating loss among co-tortfeasors as an all-or-nothing proposition, denying contribution where the fault is equally divided but granting full indemnity where the fault is disparate. See generally Prosser, *Torts* (3d ed.), pp. 273–81. Even in admiralty cases, where division of damages is traditional, the government has usually obtained full indemnification for damages assessed against it in analogous situations, as it did in *Porello* on remand, 94 F. Supp. 952 (S.D.N.Y.); *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563; *Crumady* v. *The J. H. Fisser*, 358 U.S. 423; *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124. Thus, full indemnification would be in accord with the weight of authority and practice even in the absence of the responsibility clause. In any event, Seckinger's express undertaking to bear *all* damages that might occur as a result of his fault appears to contemplate full indemnity in the circumstances alleged.

The possible alternative would be to allocate damages on a compartive basis. This would certainly be more reasonable than denying indemnification

altogether. By providing for indemnification as to damages caused by the contractor's negligence, the contractual clause does offer some support for the proposition that the loss should be allocated on the basis of fault. Allocation of damages on a comparative basis would be in accord with a growing—if still minority—body of law which views a division of damages as the rational solution in joint-fault situations. Thus, several recent non-maritime cases hold that damages are to be divided on the basis of comparative fault under an indemnity clause similar to the one here involved. *Brogdon* v. *Southern Railway Co.*, 384 F. 2d 220 (C.A. 6); *Williams* v. *Midland Constructors, et al.*, 221 F. Supp. 400, 403 (E.D. Ark.); *C & L Rural Elec. Coop. Corp.* v. *Kincaid*, 221 Ark. 450, 458, 256 S.W.2d 337, on remand, 227 Ark. 321, 299 S.W.2d 67. And a substantial minority of states—most of them by statute—now divide damages among joint tortfeasors by contribution, even where there is no contract between the parties.[15] Prosser, *supra*, p. 275. See also *National Presto Industries* v. *United States*, 338 F. 2d 99 (Ct. Cl.), certiorari denied, 380 U.S. 962 (providing for division of damages resulting

[15] Scholarly discussions of the problem of loss allocation among joint tortfeasors in the absence of contract tend strongly to favor contribution or allocation on a comparative basis. See, *e.g.*, Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 Iowa L. Rev. 517 (1952); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. of Pa. L. Rev. 130 (1932); Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 Cornell L. Q. 552 (1936); Comment, *The Allocation of Loss Among Joint Tortfeasors*, 41 So. Cal. L. Rev. 728 (1968); Comment, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 Colum. L. Rev. 123 (1965).

from mutual mistake in a government procurement contract).[16]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the cause remanded to the district court for trial.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
PETER L. STRAUSS,
Assistant to the Solicitor General.
ROBERT V. ZENER,
RONALD R. GLANCZ,
Attorneys.

NOVEMBER 1969.

[16] We do not concede that the application of a comparative negligence approach would deny the United States full indemnity. The government would then endeavor to prove at a trial that the relationship between the parties and the actions of Seckinger make appropriate a 100 percent allocation of fault to Seckinger.

APPENDIX A

Standard Form Contract 23A (Revised March, 1953), in effect at the time of this occurrence [see 44 C.F.R. (1957 Cum. Supp.) 54.11(c), 54.13 Art. 10], is set forth below in its entirety.

STANDARD FORM 23A
MARCH 1953
PRESCRIBED BY GENERAL
SERVICES ADMINISTRATION
GENERAL REGULATION NO. 13

General Provisions

(Construction Contracts)

1. DEFINITIONS

(a) The term "head of the department" as used herein shall mean the head or any assistant head of the executive department or independent establishment involved, and the term "his duly authorized representative" shall mean any person authorized to act for him other than the Contracting Officer.

(b) The term "Contracting Officer" as used herein, shall include his duly appointed successor or his authorized representative.

2. SPECIFICATIONS AND DRAWINGS

The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications

shall govern. In any case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without this determination shall be at his own risk and expense. The Contracting Officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

3. CHANGES

The Contracting Office may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however*, That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Clause 6 hereof. But nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise herein provided, no charge for any extra work or material will be allowed.

4. CHANGED CONDITIONS

The Contractor shall promptly, and before such conditions are disturbed, notify the Con-

tracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 hereof.

5. TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS

(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby, and for liquidated damages for delay, as fixed in the specifications or ac-

companying papers, until such reasonable time as may be required for the final completion of the work, or if liquidated damages are not so fixed, any actual damages occasioned by such delay. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

(b) If the Government does not terminate the right of the Contractor to proceed, as provided in paragraph (a) hereof, the Contractor shall continue the work, in which event he and his sureties shall be liable to the Government, in the amount set forth in the specifications or accompanying papers, for fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted, or if liquidated damages are not so fixed, any actual damages occasioned by such delay.

(c) The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God or of the public enemy, acts of the Government, in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors or suppliers due to such causes: *Provided,* That the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of

delay. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal as provided in Clause 6 hereof.

6. DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the head of the department, and the decision of the head of the department or his duly authorized representatives for the hearings of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive: *Provided,* That, if no such appeal to the head of the department is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

7. PAYMENTS TO CONTRACTORS

(a) Unless otherwise provided in the specifications, partial payments will be made as the

work progresses at the end of each calendar month, or as soon thereafter as practicable, or at more frequent intervals as determined by the Contracting Officer, on estimates made and approved by the Contracting Officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract: *Provided, however,* That the Contracting Officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: *And provided further,* That on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentage thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the Contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims,

if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein. If the Contractor's claim to amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended (41 U.S.C. 15), a release may also be required of the assignee at the option of the Contracting Officer.

8. MATERIALS AND WORKMANSHIP

Unless otherwise specifically provided for in the specifications, all equipment, materials, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade of their respective kinds for the purpose and all workmanship shall be first class. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the Contracting Officer shall decide the question of equality. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the Contracting Officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The Contracting Officer may in writing require the Contractor to remove from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable, or whose continued employment

on the work is deemed by the Contracting Officer to be contrary to the public interest.

9. INSPECTION

(a) Except as otherwise provided in paragraph (d) hereof all material and workmanship if not otherwise designated by the specifications, shall be subject to inspection, examination, and test by the Contracting Officer at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the Contractor shall promptly segregate and remove the rejected material from the premises. If the Contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective workmanship the Government may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost thereof to the Contractor, or may terminate the right of the Contractor to proceed as provided in Clause 5 of this contract, the Contractor and surety being liable for any damage to the same extent as provided in said Clause 5 for termination thereunder.

(b) The Contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the Contracting Officer. All inspection and tests by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full size, and performance tests shall be as described in the specifications. The Contractor shall be charged

with any additional cost of inspection when material and workmanship are not ready at the time inspection is requested by the Contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the Contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective or nonconforming in any material respect, due to fault of the Contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual direct cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the Contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and written or other formal acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site. Nothing contained in this paragraph (d) shall in any way restrict the Government's rights under any warranty or guarantee.

10. SUPERINTENDENCE BY CONTRACTOR

The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for him.

11. PERMITS AND RESPONSIBILITY FOR WORK, ETC.

The Contractor shall, without additional expense to the Government, obtain all licenses and permits required for the prosecution of the work. He shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work. He shall also be responsible for all materials delivered and work performed until completion and final acceptance, except for any completed unit thereof which theretofore may have been finally accepted.

12. OTHER CONTRACTS

The Government may undertake or award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and Government employees and carefully fit his own work to such additional work as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Government employees.

13. PATENT INDEMNITY

Except as otherwise provided, the Contractor agrees to indemnify the Government and its officers, agents and employees against liability, including costs and expenses, for infringement upon any Letters Patent of the United States (except Letters Patent issued upon an application which is now or may hereafter be, for

reasons of national security, ordered by the Government to be kept secret or otherwise withheld from issue) arising out of the performance of this contract or out of the use or disposal by or for the account of the Government of supplies furnished or construction work performed hereunder.

14. ADDITIONAL BOND SECURITY

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the the Government, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

15. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

16. OFFICIALS NOT TO BENEFIT

No member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom: but this provision shall not be construed to extend to this

contract if made with a corporation for its general benefit.

17. BUY AMERICAN ACT

The Contractor agrees that in the performance of the work under this contract the Contractor, subcontractors, material men and suppliers shall use only such unmanufactured articles, materials and supplies (which term "articles, material and supplies" is hereinafter referred to in this clause as "Supplies") as have been mined or produced in the United States, and only such manufactured supplies as have been manufactured in the United States substantially all from supplies mined, produced, or manufactured, as the case may be, in the United States. Pursuant to the Buy American Act (41 U.S.C. 10a–d), the foregoing provisions shall not apply (i) with respect to supplies excepted by the head of the department from the application of that Act, (ii) with respect to supplies for use outside the United States, or (iii) with respect to the supplies to be used in the performance of work under this contract which are of a class or kind determined by the head of the department or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or (iv) with respect to such supplies, from which the supplies to be used in the performance of work under this contract are manufactured, as are of a class or kind determined by the head of the department or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, provided that this exception (iv) shall not permit the use in the performance of work under this contract of supplies manufactured outside the United States if such supplies are

manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

18. CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

19. NONDISCRIMINATION IN EMPLOYMENT

In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin; and further agrees to insert the foregoing provision in all subcontracts hereunder except subcontracts for standard commercial supplies or for raw materials.

20. DAVIS-BACON ACT (40 U.S.C. 276A-A(7))

(a) All mechanics and laborers employed or working directly upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Copeland Act (Anti-Kickback) Regulations (29 CFR, Part 3)) the full amounts due at time of payment, computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and a copy of the wage determination decision shall be kept posted by the Contractor at the site of the work in a prominent place where it can be easily seen by the workers.

(b) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any subcontractor

directly on the site of the work covered by this contract has been or is being paid at a rate of wages less than the rate of wages required by paragraph (a) of this clause, the Contracting Officer may (1) by written notice to the Government Prime Contractor terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said required wages, and (2) prosecute the work to completion by contract or otherwise, whereupon such Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(c) Paragraphs (a) and (b) of this clause shall apply to this contract to the extent that it is (1) a prime contract with the Government subject to the Davis-Bacon Act or (2) a subcontract under such prime contract.

21. EIGHT-HOUR LAWS—OVERTIME COMPENSATION

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed for each laborer or mechanic for every

calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided,* That this stipulation shall be subject in all respects to the exceptions and provisions of the Eight-Hour Laws as set forth in 40 U.S.C. 321, 324, 325, 325a, and 326, which relate to hours of labor and compensation for overtime.

22. APPRENTICES

Apprentices will be permitted to work only under a bona fide apprenticeship program registered with a State Apprenticeship Council which is recognized by the Federal Committee on Apprenticeship, U.S. Department of Labor; or if no such recognized Council exists in a State, under a program registered with the Bureau of Apprenticeship, U.S. Department of Labor.

23. PAYROLL RECORDS AND PAYROLLS

(a) Payroll records will be maintained during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records will contain the name and address of each such employee, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid. The Contractor will make his employment records available for inspection by authorized representatives of the Contracting Officer and the U.S. Department of Labor, and will permit such representatives to interview employees during working hours on the job.

(b) A certified copy of all payrolls will be submitted weekly to the Contracting Officer. The Government Prime Contractor will be re-

sponsible for the submission of certified copies of the payrolls of all subcontractors. The certification will affirm that the payrolls are correct and complete, that the wage rates contained therein are not less than the applicable rates contained in the wage determination decision of the Secretary of Labor attached to this contract, and that the classifications set forth for each laborer or mechanic conform with the work he performed.

24. COPELAND (ANTI-KICKBACK) ACT—NONREBATE OF WAGES

The regulations of the Secretary of Labor applicable to Contractors and subcontractors (29 CFR, Part 3), made pursuant to the Copeland Act, as amended (40 U.S.C. 276c) and to aid in the enforcement of the Anti-Kickback Act (18 U.S.C. 874) are made a part of this contract by reference. The Contractor will comply with these regulations and any amendments or modifications thereof and the Government Prime Contractor will be responsible for the submission of affidavits required of subcontractors thereunder. The foregoing shall apply except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances, and exemptions.

25. WITHHOLDING OF FUNDS TO ASSURE WAGE PAYMENT

There may be withheld from the Contractor so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics employed by the Contractor or any subcontractor the full amount of wages required by this contract. In the event of failure to pay any laborer or mechanic all or part of the wages required by this contract, the Contracting Officer may take such action as may be necessary to cause the suspension, until such violations have ceased, or any further payment,

advance, or guarantee of funds to or for the Government Prime Contractor.

26. SUBCONTRACTS—TERMINATION

The Contractor agrees to insert Clauses 20 through 26 hereof in all subcontracts and further agrees that a breach of any of the requirements of these clauses may be grounds for termination of this contract. The term "Contractor" as used in such clauses in any subcontract shall be deemed to refer to the subcontractor except in the phrase "Government Prime Contractor."

U.S. GOVERNMENT PRINTING OFFICE: 1989